Supreme Court, U.S.
FILED

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No._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2002

MARIE BERTHE FRANCOIS, Petitioner

v.

PUTNAM INVESTMENTS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED FOR REVIEW

1. At what point does the worker's Seventh Amendment right to a jury trial on a claim of racial discrimination against an employer violated by the court's application of Federal Rules of Civil Procedure Rule 56, 28 U.S.C.A.

PARTIES TO PROCEEDING BELOW

The parties to the proceedings below are Plaintiff-Petitioner Marie Berthe Francois and Defendant-Respondent Putnam Investments, LLC.

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IN THE SUPREME COURT
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October Term, 2002

MARIE BERTHE FRANCOIS, Petitioner

v.

PUTNAM INVESTMENTS, LLC., Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner Marie Berthe Francois respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for for the First Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Appendix, infra.) is not published.

JURISDICTION

The court of appeals entered its judgment on April 25, 2002 and entered its denial of a petition for re-rehearing en banc on July 23, 2002 (Appendix, infra.). The jurisdiction of this court is invoked under 28 28 U.S.C. &1254 (I).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution:

U.S. Const. Amend. VII provides, in pertinent part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved...."

Statutes:

28 U.S.C.A., Fed Rules of Civ. Proc.Rule 56

Title VII of the 1964 Civil Rights Act

Mass. Gen. Laws, c. 151B, sec. 4

STATEMENT OF THE CASE

Petitioner, Marie Berthe Francois ("Francois"), filed a civil action against Respondent, Putnam Investments, LLC., ("PutnamA"), asserting that Putnam had violated violated her rights under Massachusetts General Laws, c. 151B, sec. 4, paragraph 1 and under Title VII of the 1964 Civil Rights Act.

The allegations brought by Francois in the federal district court in Massachusetts accused Putnam of racially discriminating against her while she was employed at the company.

Putnam denied the allegations and subsequently filed a motion for summary judgment pursuant to Fed. Rules of Civ. Proc.Rule 56. Francois opposed the motion, and without a hearing, the district court allowed the motion on May 29, 2001.

Francois filed an appeal on June 22, 2001 with the United States Court of Appeals for the First Circuit, which on April 25, 2002 affirmed the lower court's decision. On July 23, 2002, the First Circuit denied Petitioner's petition for rehearing en banc.

A. The Pertinent Facts

Francois began working for Putnam, an investment company, on October 6, 1996 on a part-time basis with the promise that she would become a full-time employee within a month. She was later assured of that position because Putnam was satisfied with her work productivity.

However, on November 8, 1996, she was told by her supervisor that she would not be hired because of dissatisfaction with her work, notwithstanding the fact that from October to December of that year, the only derogatory data in Putnam's files regarding her was verbal warnings for alleged tardiness.

At that time Francois was the only black employee in Putnam's Adjustments Department. Later it was revealed that a white female was hired as a permanent Putnam employee on October 21, 1996 and two additional employees were promoted to permanent full-time status on December 9 of that year.

Prior to Francois leaving Putnam in January 1997, she also was subjected to racially derogatory remarks from her department manager and a supervisor. She was asked, for example, whether she practiced voodoo; it was asserted that she came to the United States in a boat – a reference to her national origin (Haitian) – and there were nasty remarks regarding her accent. In addition, a supervisor alluded to the "real racists at Putnam" while telling Francois that he was told "to get rid of" of her.

A racial discrimination complaint was filed by Francois against Putnam with the Massachusetts Commission Against Discrimination ("MCAD"), which on July 8, 1997 found, following an investigation, that she had been discriminated against by Putnam based on her race/color and national origin. Francois subsequently filed her verified complaint, which included a demand for a jury trial.

REASONS FOR GRANTING THE WRIT

The decision of the First Circuit in this case is contrary to the standard that should be applied in allowing summary judgment pursuant to Fed. Rules Civ. Proc. Rule 56, 28 U.S. C.A and, in affirming that judgment, the court has infringed on the petitioner's right to a jury trial pursuant to the Constition's Seventh Amendment.

What the First Circuit has failed to do is to ignore the fact that there exists in the total record of this case sufficient conflicting evidence to warrant a conclusion that genuine issues of material fact exist. That conclusion precludes the allowance and affirmation of a summary judgment motion.

Notwithstanding the First Circuit's acknowledgement that it must consider the evidence "in the light most favorable to, and drawing all reasonable inferences in favor of, the non-moving party" (see *Felicinao de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 5 (1st Cir. 2000), it has not done so.

The court brushes aside conflicting information regarding the work performance of Francois, in part, derived from the petitioner's verified complaint and Putnam's own documents regarding her job performance, pays no heed to the MCAD finding, notwithstanding the fact that is part of her verified complaint, seemingly bypasses and/or shuns the racially derogatory remarks in an effort to not only deny that a factual dispute exists but also to justify its position that evidence of pretext was not present and no discriminatory animus exists.

The very existence of biased remarks may support an inference of pretext, and discriminatory remarks related to the decisional process may be sufficient to prove an employer's alleged animus. *Rivera-Rodriquez v. Frito Lay Snacks Caribbean*, 265 F.3d 15, 20 (2001). Furthermore, as held in *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23 (2001), the Court of Appeals must exercise particular caution before sustaining summary judgment for employers in discrimination actions on such issues as pretext, motive and intent.

The First Circuit has erred in undercutting Francois' supporting material while giving too much credence to Putnam's self-serving documents while not recognizing that it is the

very nature and content of opposing sworn statements that support the position that there exists disputed issues of material fact that needed to be determined by the factfinder.

Contrary to the First Circuit's statement regarding oral argument in this case, the court was informed that MCAD had concluded that Putnam had discriminated against Francois.

The First Circuit held in *Simas v. First Citizens' Federal Credit Union*, 170 F.3d 37 (1999), the competence of the nonmovant's own testimony is treated no differently than that of any other potential trial witness. Yet it is not adhering to that standard in this case

The First Circuit has not moved with caution regarding its affirmation of summary judgment in this case and, as a result, has thwarted the petitioner's right to a jury trial.

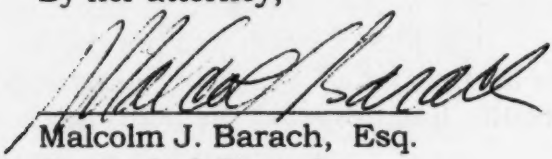
CONCLUSION

For the above reasons, the Petitioner, Marie Berthe Francois, respectfully requests that this court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

Marie Berthe Francois,

By her attorney,



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(NOT FOR PUBLICATION -NOT TO BE CITED AS PRECEDENT)

United States Court of Appeals
For the First Circuit

No. 01-1979

MARIE BERTHE FRANCOIS,

Plaintiff, Appellant,

v.

PUTNAM INVESTMENTS, LLC,

Defendant, Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Joseph L. Tauro, U.S. District Judge)

Before

Lynch, Circuit Judge,
Campbell and Bownes, Senior Circuit Judges.

Malcolm J. Barach for appellant.
Ilene Robinson Sunshine, with whom Sullivan & Worcester LLP were on brief, for appellee.

April 25, 2002

BOWNES, Senior Circuit Judge. This is an appeal by Plaintiff-appellant Marie Berthe Francois from a grant of summary judgment to defendant-appellee Putnam Investments, LLC. Plaintiff is an African-American woman whose country of origin is Haiti. She claims that defendant failed to promote her to a full-time position, as promised, because of her race and national origin. The district court, in a well-reasoned opinion, found that Plaintiff failed to establish a prima facie case of discrimination. We affirm.

I. FACTS

Defendant's business is providing financial investment services. Plaintiff first worked for defendant as a part-time temporary employee in Putnam's Image Operations Department, performing photocopying and related tasks. She started work in November, 1994, but left her job less than a year later without giving notice. This would normally render her ineligible to be rehired under Putnam's employment rules.

Plaintiff applied for work again with Putnam in September 1996.Her previous employment record apparently was not noted by defendant because she was hired as a temporary processor in Putnam's Adjustments Department. As a processor, plaintiff was involved in data processing and making adjustments in records of various financial transactions. This work was considered to be difficuilt and demanding. Newly-hired processors received dual training: direct instructions and on –the-job training. It soon became evident to plaintiff's supervisors that plaintiff was unable to grasp the fundamentals of the adjustments process. Defendant used a weekly tracking system to determine the productivity and accuracy of its processors. Plaintiff's track record showed that she did no approach Putnam's target standards and consistently performed below the level of her peers.

Defendant decided that plaintiff should be given the opportunity to retrain in the adjustments department in November, 1996. Three supervisors met with plaintiff and told her that if performance improved after the retraining, she would be given the next available permanent appointment in the adjustments department. Plaintiff's retraining was not successful. According to defendant, plaintiff also added to her work difficulties by reporting late for work on three occasions between early November and December, 1996. She was given an early warning

that lasted for three months, until March 3, 1997. Defendant had a policy that prohibited a temporary employee from becoming a permanent employee while under a disciplinary warning.

In mid-December, 1996, plaintiff filed a charge with the Massachusetts Commission Against Discrimination (MCAD) alleging that one of her supervisors, Ronald Cupples, delayed her permanent appointment, citing her lack of productivity. Plaintiff alleges, however, that this was only a pretext to cover up racial discrimination. Another of her supervisors, Robbin Beauchamp, met with plaintiff to investigate her claim of racial discrimination and discuss the MCAD charge. As quoted at length, infra, plaintiff offered two differing accounts of this conversation, from which she claims racial discrimination against her can be found.

On January 9, 1997, Beacuchamp again met with plaintiff to explore the possibility of her being transferred to the Image Operations Department. According to Beauchamp's affidavit, plaintiff did interview for a job in the Image Operations Department. She was rejected for the position after she told the hiring manager that she had previously worked in the department and did not like the management, rules, work, or atmosphere.

In late January, 1997, plaintiff was assigned to work on her department's "special projects." These projects were adjustments to customer accounts that were very extensive and took much longer than the regular process adjustments. She was assigned to work with Trisha Labonte, who reviewed and exercised quality control over all of the plaintiff's work. Labonte met with plaintiff and pointed out to her that she was not doing the work properly and did not have a good understanding of what was required. Labonte gave plaintiff a copy of memo that she (Labonte) was giving to the department supervisor. It contained a list of five mistakes that plaintiff had made on a project on which she had worked. According to Labonte, plaintiff signed the memo without comment.

On February 6, 1997, plaintiff expressed an interest in two vacant processing jobs in other departments, but was told that she was ineligible for another processing position. On February 12, 1997, plaintiff resigned from Putnam. She left a note on Cupples's desk, which read:

I will not be here on Friday, 2/14/97. I will not have a chance to see you and say good bye. If I don't, I want you to know it was a pleasure to have you as my supervisor. I had learn (sic) a lot from here. I will miss everybody.

Sincerely,
Marie Berthe Francois

Beauchamp started in an affidavit that at the time plaintiff resigned, she told him that her husband was returning to Haiti for work and she needed to stay at home and care for their children.

II. STANDARD OF REVIEW

Our review is de novo. Mulero-Rodrdiquez v. Ponte, Inc., 98 F.3d 670, 672 (1st Cir. 1996). We must consider the evidence " in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000).

Where the party opposing summary judgment has not presented specific competent proof of a genuine issue of material fact, we must affirm the judgment below. Rogan v. City of Boston, 267 F.3d 24, 27 (1st Cir. 2001); Crawford v. Lamantia, 34 F.3d 28, 31 (1st Cir. 1994), cert. denied, 514 U.S. 1032 (1995).

III. DISCUSSION

Plaintiff asserts two claims of racial discrimination: one under federal law for violation of Title VII of the Civil Rights Act of 1964, and one under the laws of Massachusetts. Mass. Gen. L. ch. 151B. After ruling that plaintiff had not proven a prima facie case of discrimination under federal law, the district court dismissed the state law claim on the same grounds.

Plaintiff argues that the district erred by: failing to closely examine the overall record and total circumstances of the case; ignoring plaintiff's verified complaint (and sworn statement filed with the MCAD); and improperly weighing the validity of initial material offered as evidence.

We begin our analysis by examining the verified complaint and the sworn statement filed with the MCAD. Under the law of this circuit a verified complaint is treated as the

> functional equivalent of an affidavit to the extent that it satisfied the standards in Rule 56 (e) (in summary judgment milieu, affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein").

Skeinkopf v. Stone, 927 F.2d 1259, 1262 (1st Cir. 1991); see also Simas, 170 F.3d at 46.

In reviewing the sworn allegations in plaintiff's complaint we keep in mind the restrictions that apply:

> At summary judgment, the district court cannot accept on faith conclusory assessments by claimants that unspecified and unattributed epithets were "derogatory" and "denigrating," let alone demonstrated discriminatory intent. See Pilgrim, 118 F.3d at 871 (noting that plaintiff's "(subjective) perception is not evidence" of discriminatory intent, hence "not enough to withstand summary judgment"); ... see also Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc) ("It is ... well settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate nondiscriminatory reason.").

Santiago v. Canon USA, Inc., 138 F.3d 1, 6 (1st Cir. 1998).

Paragraph 7 of the verified complaint states: "Francois was promised and assured that she would become perma-

nent full-time because defendant was satisfied with her productivity." The basic question in this case is whether plaintiff adduced sufficient evidence that she left her employment because racial discrimination barred her from becoming a permanent employee rather than her being denied permanent status because she was unable to do the required work.

There is nothing in the record beyond plaintiff's self-serving statements that defendant "was satisfied with her productivity." Indeed, the affidavits and statements filed by defendant are directly contrary. Moreover, the record shows that in process of training for a temporary position, she quit without formal notice to defendant. And the note she left for Cupples did not contain any claims of racial discrimination; rather, it stated: "I want you to know it was a pleasure to have you as my supervisor." According to Beauchamp's affidavit, plaintiff told him that her reason for leaving was that her husband had returned to Haiti and plaintiff had to look after their children. On the record, we find it hard not to accept the district court's conclusion that an essential element of plaintiff's prima facie case is lacking – namely the existence of credible evidence that plaintiff was qualified to perform the permanent data processing position she sought.

Moreover, even assuming plaintiff had established a prima facie case, defendant presented overwhelming evidence that it had a legitimate, non-discriminatory reason for not promoting plaintiff to a permanent position. Evidence of pretext was simply absent. The pleadings and pretrial material show that the only evidence of racial discrimination came from plaintiff's conclusory allegations.

The racially discriminatory statements that plaintiff alleges were made by Cupples and Joseph Larabee (Senior Operations Manager at Putnam who approved plaintiff's hiring in 1996) were denied by both. We realize that the denials do not erase the alleged statements and that if they were of sufficient significance to warrant a finding, the question of whether or not they were made as asserted would be a disputed issue of material fact for the factfinder to determine. The question for us is not credibility, but materiality.

At her pretrial deposition, plaintiff testified as follows:

Q. Can you tell me who at Putnam you think was responsible for discriminating against you because of your race?

A. I don't know. After I filed the complaint, my supervisor approached me and told me, "I've got nothing to do with you, Marie. If it was for me you'd be here forever. But I have orders from the upper management to get rid of you because you were hired by mistake."

Q. Who told you that?

A. Ron Kupples (sic).

Q. He told you he was ordered to get rid of you?

A. He got order (sic) from upper management to get rid of me, because, "I cannot fire you, you didn't do nothing." He called me on the December after they find (sic) out about the MCAD complaint. And then he called me not at his office, not as his cube, in the conference room where we always have the staff meeting. It's like a private room like this one here.

He says, the first thing he asked me, "Why are you doing this, Marie? I'm not a racist." I said, "Then who is the racist" He says, "I just want you to know I get (sic) order to get rid of you. You haven't done anything. I cannot just fire you like that. But I got, they give me an order to get rid of you because you were hired by mistake."

I asked him, "What do you mean by that, I was hired by mistake?" He says to me, "Be smart, but I'm not a racist." I asked him, "Why did they want to get rid of me? I did; not do anything." He said, "Be smart, Marie. Come on. It's just to let you know I'm not a racist."

Several pages later, plaintiff described a slightly different version of what she viewed as racial discrimination.

I though it was going to be at his cube. He said, "No, let's go to the conference room, that would be more private and confidential." He said, "Why are you doing this?" I said, "What, what am I doing?

doing this?" I said, "What, what am I doing? He said, "We find out there's a complaint with the MCAD." And he showed me a copy of it. I said, "Yes, I did." He said, "Why? And I explained it to him. He said, "Marie, I'm not a racist. The real racist, you don't even point your finger at the real racist. My position is to get rid of you because you were hired by mistake. I get the order get rid of you, somehow, get Marie out of the company. But you haven't done nothing. I can't just fire you, because you do nothing.

But he said, "My job is to put you in the position to stress you out to leave the company." And then I asked him, I said, "What do you mean by I was hired by mistake? He stated, "Come on, Marie. Be smart. You know what I'm talking about." I said, "Okay."

Even if we accept the attributed statements as true, they are not sufficient alone or in addition to the other alleged instances of racial discrimination stated in the verified complaint to substantiate plaintiff's claim of racial discrimination. They fail as a matter of law. See, e.g., Cardona v. United Parcel Service, 79 F. LSupp. 2d 35, 42 (D.P.R. 2000) (noting a court should not accept a nonmovant's "conclusory allegations regarding discriminatory intent").1

We agree with the district court that plaintiff failed to make out a prima facie case of discrimination based on race and/or country of origin. Accordingly, we conclude that, based on the record and the pleadings, the district court properly dismissed both the federal and state law claims **Affirmed**.

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1 Paragraph 28 of the verified complaint states:

> On July 8, 1997 MCAD found there was sufficient evidence that Francois was discriminated against by Putnam based on her race/color and national origin and, Subsequently, Francois informed MCAD that she would proceed with her case in court.

But there is no copy of such a finding in the record. Based

on our reading of the record and statements made by counsel at oral argument, no finding was made by MCAD. Plaintiff claims that she was told what is alleged by an employee of the MCAD. Plaintiff, however, does not know the name of the employee who supposedly gave her the information and offers no other support for her contention that the MCAD made such a finding.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-1979

MARIE BERTHE FRANCOIS,
Plaintiff, Appellant,

v.

PUTNAM INVESTMENTS INCORPORATED,
Defendant, Appellee.

Before

Boudin, Chief Judge
Campbell and Bownes, Senior Circuit Judges,
Torruella*, Selya, Lynch, Lipez and Howard, Circuit Judges,

ORDER OF COURT

Entered: July 23, 2002

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be reheard by the Court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Richard Cushing Donovan, Clerk.

By "s/Janice O'Neil
Chief Deputy Clerk.

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*Judge Juan R. Torruella is recused from this matter.

(cc: Mr. Barach and Ms. Sunshine)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARIE BERTHE FRANCOIS *

Plaintiff, *

v. *

* Civil Action No. 99-CV-10800-JLT

PUTNAM INVESTMENTS, INC., *

Defendant

MEMORANDUM

May 28, 2001

TAURO, J.,

Plaintiff Marie Berthe Francois ("Francois"), a resident of North Attleboro, Massachusetts, alleges employment discrimination on account of her race and national origin by Defendant Putnam Investments ("Putnam"). Specifically, Francois alleges that Putnam violated federal and state anti-discrimination laws1 by not promoting her to a full-time permanent position. Before the court is Putnam's Motion for Summary Judgment.

Background

Francois is an African-American woman of Haitian descent. Putnam provides financial services to various clients. Francois was a part-time employee of Putnam from November 1994 to August 1995, and then from October 6, 1996 to February 28, 1997.

Putnam claims that, in August 1995, Francois failed to give two weeks notice before leaving the company. Putnam has a policy against rehiring former employees who leave without giving notice. Unaware of

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1Count I alleges violations of Mass. Gen. Laws ch. 151B &4 (2000); Count II alleges violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. & 2000e (2000).

her previous employment, Putnam rehired Francois in October 1996. Upon her rehiring, Putnam assigned Francois to a data processing position in the Adjustments Department. Francois was the only African-American working in that department. The Human Resources Department later discovered Francois' previous employment and, due to the prior lack of notice and a then-current tardiness problem, placed Francois' promotion to a full-time permanent position on hold.

Francois alleges that Putnam promised to appoint her to a full-time position in November 1996. On October 14, 1996, Joseph E. Larrabee ("Larrabee"), Senior Operations Manager in charge of the Adjustments Department, told Francois that she would be promoted to a permanent position within the next month. Her supervisor, Ronald Cupples ("Cupples"), later told her that Putnam would not hire her as a permanent employee because her productivity was below Putnam's expectations.

When Francois inquired about her promotion to a full-time permanent position, Larrabee and Cupples told her that the department would be losing a permanent position, with another not coming available until after tax season. But two other Putnam employees, one of whom was white, were promoted to full-time permanent positions less than two weeks later.

Francois filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") on December 23, 1996, alleging that she was the subject to different treatment based on her race and national origin. Specifically, Francois alleged that two similarly situated employees were appointed to full-time permanent positions and she was not. Although there is no support in the record, Francois asserts that on July 8, 1997, MCAD found sufficient evidence that she suffered discrimination at the hands of her employer because of her race and national origin.

Francois claims that, except for three verbal warnings for alleged tardiness, her job performance was satisfactory. Francois also alleges that her "productivity has surpassed the requirement of the company policy."2 On or about February 12, 1997, Francois voluntarily resigned her position at Putnam effective February 28, 1997.

Discussion

A. Summary Judgment Standard

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."3 Summary judgment is disfavored in employ-

ment discrimination cases based on disparate treatment.4 But "where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation."5

B. Title VII

This court addresses the Federal claim first. Francois alleges that Putnam refused to promote her to a full-time permanent position on account of her race and national origin in violation of Title VII of the Civil Rights Act of 1964 ("Title VII").6 Title VII provides that "(i)t shall be unlawful...for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color...or national origin." Where a Title VII plaintiff cannot offer direct proof of an employer's discrimination, the court will apply the framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green. 8 Under the McDonnell Douglas test, Francois bears the initial burden of establishing a *prima facie* case of discrimination.9

In order to establish a *prima facie* case of discrimination, a Title VII plaintiff must show a preponderance of the evidence that she: (1) is a member of a protected class, (2) possessed the necessary qualifications and adequately performed her job, (3) was denied a promotion, and (4) other employees of similar qualifications who were not members of a protected group were promoted.10

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2 (Pl.'s Mem. In Supp. of her Opp'n to Def.'s Summ. J. Mot. Ex. A.).

3 Fed. R. Civ. P. 56 (c).

4. Blare v. Husky Injection Molding Systems of Boston, Inc., 646 N.E.2d 111, 114 (Mass. 1995).

5. Lehman v. Prudential Insurance Co. of Am., 74 F.3d 323, 327 (1st Cir. 1996) (quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

6. 42 U.S.C. & 2000e-2.

7. Id.

8. 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Suarez, 229 F.3d at 53.

9. Smith v. Stratus Computer, Inc., 40 F.3d 11, 15 (1st Cr. 1994).

10. McDonnell Douglas, 411 U.S. at 802; Lehman, 74 F.3d at 327; see Bundy v. Jackson, 641 F.2d 934, 951 (D.C.Cir. 1981) (adjusting the McDonnell Douglas test for a discriminatory refusal to promote case).

The burden to establish a *prima facie* case is not especially burdensome, 11 and "establishment of a *prima facie* case creates a a presumption of unlawful discrimination." 12

Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action.13 Should the defendant meet this requirement, the burden shifts back to the plaintiff who must establish that the defendant's reason is either a pretext for discrimination or in fact actual discrimination.14 At the summary judgment stage of an employment discrimination case, the defendant can prevail only if the plaintiff fails to provide sufficient evidence allowing a rational fact-finder to conclude that the plaintiff was denied a promotion on account of her race and national origin.15

C. Francois' *Prima Facie* Case

As an African-American of Haitian descent, there is no dispute that Francois meets the first prong of the *prima facie* case. There is also no dispute that Francois was denied a promotion to a full-time position, thereby satisfying the third prong of the McDonnell Douglas test. The dispute centers around the second prong – whether Francois has established by a preponderance of the evidence that her job performance met acceptable standards.

In order to meet the second prong of the *prima facie* case, Francois must submit evidence that she was qualified for the position and she met Putnam's job expectations. By virtue of her hiring, it is safe to conclude that Francois was qualified for her position in the Adjustments Department. Whether Francois adequately performed her job is more problematic.

Francois cannot rely on "barefaced assertions" as evidence that she met Putnam's job performance standards.16 In Ahmed v.

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11 Woodman v. Haemonetics Corp., 51 F.3d 1087, 1091 (1st Cir. 1995).

12. Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 19 (1st Cir. 1999).

13. Id.

14. Id.

15. Id.

16. Ahmed v. Berkshire Medical Center, Inc., No. CIV.A. 94-30250-FHF, 1998 WL `157016, at *7 (D. Mass. March 21, 1998).

Berkshire Medical Center, Inc., the plaintiff was an Indian medical resident at a teaching hospital. 17 A few months after hiring, supervisors became concerned about the plaintiff's poor attitude.18 The Residency Program Director ("the Director") received several complaints from other physicians concerning the plaintiff's bad behavior and his inability to work effectively with physicians and staff. 19 In a meeting with the Director, plaintiff refused to accept responsibility for his actions and blamed the other physicians and staff for the problems. 20 By the end of the meeting, the Director decided to terminate the plaintiff based on continued concerns about plaintiff's ability to work with others and meet his job expectations. 21 The plaintiff filed suit alleging that his termination was based on discrimination due to his national origin in violation of Title VII. 22

Granting summary judgment for the defendant, the District Court in Ahmed stated that, "plaintiff has submitted no evidence other than his barefaced assertions that he made absolutely no error, whether they be major or minor, during his employment at the hospital." 23 The court found that "plaintiff had not submitted even minimal evidence to meet his slight evidentiary burden." 24

Putnam's position here is similar to the defendant's in Ahmed. For example, Putnam submitted an affidavit of one of Francois' supervisors stating that Francois would be more successful working at a slower pace and that she required additional training. 25 Another supervisor testified that Francois required additional training, experienced difficulty in her training classes, had difficulty understanding the fundamentals of her job, and was late for work on three occasions. 26 The Senior Operations Manager testified that he had received several complains from Francois' co-workers that she was distracting them with questions about how to perform her job and that she needed additional training. 27 A Human Resources

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17 Id. at *3-4.
18 Id. at *3.
19. Id.
20. Id. at *4.
21. Id.
22. Id. at *5.
23. Id. at *7., 24. Id.
25. (Robinson Aff. && 4,5.).
26, (Cupples Aff. && 6, 10, 12.).
27. (Larabee Aff. & 4.).

representative testified that Francois was warned about her tardiness, given an opportunity to complete training a second time because of the difficulty she was having mastering the basics of her job, and had difficulty understanding her job. 28

Putnam also submitted several documents, memoranda, and reports that summarize Francois' productivity, accuracy, and job performance. 29 These submissions support Putnam's assertions that Francois' job performance was inadequate. Viewed in its totality, this is sufficient evidence that Francois was not adequately performing her job.

In contrast, Francois asserts that her job performance exceeded company policy. In support of this contention, Francois submitted an undated letter that she wrote to MCAD stating, "my productivity has surpassed the requirement of the company policy." 30. Plaintiff did not, however, submit the company policy, her performance reviews, records of her productivity, or any other evidence that would create a genuine issues of material fact. Similar to the plaintiff in Ahmed, Francois relies only on her own assertions that she adequately performed her job. Her mere assertions are not enough to establish a *prima facie* case of discrimination.

A plaintiff's own assessment of her achievements and abilities, standing alone, is not sufficient evidence to establish the job performance prong of the *prima facie* case.31 Since Francois fails to meet her burden of production on the second prong, there is no need for the court to address the fourth prong of the McDonnell Douglas test, i.e., whether other employees with similar qualifications were promoted to full-time permanent positions. Because Francois failed to carry her burden of establishing a *prima facie* case, Summary Judgment is appropriate.

D. State Law Claim

Francois also alleges violations of the state anti-discrimination statute making it unlawful for an employer to

28. (Beauchamp Aff. && 6, 9, 12.).

29. (Beauchamp Aff. Ex. 1, 3; Robinson Aff. Ex. 1, 2, 3.).

30. (Pl's Mem. of Law in Supp. of her Opp'n to Def.'s Summ. J. Mot. Ex. A.).

31. Keisling v. Ser-Jobs for Progress, Inc., 19 F.3d 755, 760 (1st Cir. 1994).

discriminate against any individual because of their race or national origin. 32 Massachusetts courts apply the McDonnell Douglas framework where, as here, there is no direct evidence of discrimination. 33 Accordingly, the foregoing analysis is applicable to Francois' state claim as well. Given that Francois is unable to establish a *prima facie* case of discrimination on her federal claim, Summary judgment on the state law claim is also appropriate.

Conclusion

In order to establish an employment discrimination claim, Francois must provide sufficient evidence of a *prima facie* case of discrimination. Francois has failed to produce sufficient evidence to rebut Defendant's claims that she was not adequately performing her job. Without such evidence, Francois cannot evidence establish a *prima facie* case of discrimination. Defendant's Motion for Summary Judgment, therefore, is ALLOWED. AN ORDER WILL ISSUE.

"s/Joseph L. Tauro

United States District Judge

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31. Mass. Gen. Laws ch. 151B (2000)
32. Abramian v. President & Fellows of Harvard College, 731 N.E.2d 1075, 1084 (Mass. 2000).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARIE BERTHE FRANCOIS *
*
Plaintiff, *
*
v. *
* Civil Action No. 99-CV-10800-JLT
*
PUTNAM INVESTMENTS, INC., *
*
Defendant

ORDER

May 28, 2001

TAURO, J.,

Defendant's Motion for Summary Judgment (#13) is ALLOWED.

IT IS SO ORDERED.

"s/ Joseph L. Tauro

United States District Judge